UNITED STATES DISTRICT COURT DISTRICT OF MAINE

LYNN MARIE BOYD,)	
)	
Plaintiff)	
)	
v.)	Docket No. 04-35-B-W
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who alleges disability stemming from diabetes, diabetic neuropathy and carpal tunnel syndrome, is capable of making an adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 416.920; Goodermote v. Secretary of Health & Human Servs., 690 F.2d 5, 6 (1st Cir. 1982), the administrative

¹ This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 19, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff suffered from diabetes and carpal tunnel syndrome on the left, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 2, Record at 22; that she lacked the residual functional capacity ("RFC") to lift and carry more than ten pounds or to climb, balance, stoop, kneel, crouch or crawl more than occasionally, Finding 4, id. at 23; that she had no past relevant work, Finding 5, id.; that her RFC limitations diminished her capacity for the full range of light work, Finding 6, id.; that based on her exertional capacity for light work and her age ("younger individual"), education (limited) and work experience (no relevant work history), Rule 202.17 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") would direct a conclusion of not disabled, Findings 7-10, id.; that her capacity for light and sedentary work was not significantly compromised, and a finding of disabled accordingly was reached within the framework of the above-cited rule, Finding 11, id.; and that she therefore was not under a disability at any time through the date of decision, Finding 12, id. The Appeals Council declined to review the decision, id. at 9-10, making it the final determination of the commissioner, 20 C.F.R. § 416.1481; Dupuis v. Secretary of Health & Human Servs., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant

work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff asserts that the administrative law judge erred in (i) declining to adopt manipulative and environmental RFC limitations found by two Disability Determination Services ("DDS") examining consultants, Charles B. Kriegel, D.O., and Eric J. Caccamo, D.O., (ii) relying on Grid Rule 202.17, which presupposes an exertional capacity for light work, even though her own RFC findings were inconsistent with such a capacity, and (iii) failing to call upon the services of a vocational expert. *See generally* Itemized Statement of Errors Pursuant to Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 8). I find no reversible error.

I. Discussion

A. Failure to Adopt RFC Limitations

As a threshold matter, the plaintiff faults the administrative law judge for failing to adopt certain manipulative and environmental limitations found by two DDS examining consultants, Drs. Kriegel and Caccamo. *See id.* at 2-4. By report dated April 1, 2002, Dr. Kriegel opined that "lifting, carrying, [and] handling objects would be difficult [for the plaintiff] due to this patient's combined diabetic neuropathy and carpal tunnel." Record at 437. Approximately a year later, on March 12, 2003, Dr. Caccamo indicated that the plaintiff's impairments (i) affected her ability to reach, handle, feel and push/pull and (ii) imposed restrictions with respect to temperature extremes, noise, vibration and fumes/dust/poor ventilation. *See id.* at 537-38.

The plaintiff filed the SSI application in question on May 31, 2001, alleging an onset date of November 2000. *See id.* at 15. At hearing, she sought to amend that onset date to April 20, 1998, a change that would encompass her condition during the time she had filed two previous SSI applications, in 1998 and 1999. *See id.* At oral argument, her current counsel conceded that there is insufficient evidence of record that his client was disabled as of 1998 or 1999; however, he posited that the fresher evidence of record supports that she has been disabled from the time of filing of the current application (in 2001) forward. He contended that given the progressive nature of the plaintiff's condition, the administrative law judge had erred in not giving greater weight to that fresher evidence.

I am unpersuaded. An administrative law judge is entitled – indeed, obliged – to resolve conflicts in the medical evidence. *See, e.g., Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

Such conflicts are present in this case. While Drs. Kriegel and Caccamo found manipulative limitations and Dr. Caccamo also found environmental restrictions (among them a limitation on exposure to vibration) other physicians did not – including physicians who assessed the plaintiff's condition from 2001 onward. In addition to the reports of Drs. Kriegel and Caccamo, the Record contains (i) a report dated June 22, 1998 from DDS examining consultant Behzad Fakhery, M.D., noting no such manipulative or environmental restrictions and opining, "At present, she basically can walk, lift, carry, bend, travel, etc., and should be a candidate for at least light duty work[,]" Record at 247-49, (ii) a report dated March 8, 2000 from DDS examining consultant Pamela J. Wansker, D.O., noting no such environmental restrictions and stating, "She does not have any specific restrictions [as] to handling objects," *id.* at 265, 268, (iii) a report dated November 8, 2001 from DDS examining consultant Gavin Ducker, M.D., noting no such

environmental restrictions and opining, "She can handle objects normally[,]" *id.* at 410, 412, and (iv) three RFC evaluations by DDS non-examining consultants, none of whom found push-pull or manipulative limitations, *see id.* at 299-306 (RFC assessment dated August 7, 2000 by Gary Weaver, M.D.), 428-35 (RFC assessment dated November 13, 2001 by Robert Hayes, D.O.), and 438-45 (RFC assessment dated April 18, 2002 by Richard Chamberlin, M.D.), and only one of whom opined that the plaintiff should avoid exposure to vibrating tools, *see id.* at 442 (Chamberlin RFC).

What is more, the administrative law judge's rationale for declining to adopt the Kriegel and Caccamo reports, although short on detail, is adequate: "Although some examining physician[s] repeat the claimant's alleged limitations as if they were their own findings, the medical findings of their examinations do not support the limitations alleged." Record at 21. This observation is supported by (i) Dr. Chamberlin's declination to find any manipulative limitations even taking into consideration Dr. Kriegel's report, *compare id.* at 437 *with id.* at 441, and (ii) Dr. Caccamo's failure to complete those portions of his RFC report requesting that he describe the limitations noted and specify the medical/clinical findings that supported them, *see id.* at 535-38.²

As the plaintiff points out in her Statement of Errors, *see* Statement of Errors at 4, the basis on which the administrative law judge rejected Dr. Chamberlin's vibrating-tool restriction is unsupported. The administrative law judge stated that no examining physician had found such a restriction when, in fact, Dr.

² Dr. Caccamo also submitted a narrative report of his examination of the plaintiff. *See* Record at 531-34. As counsel for the commissioner observed at oral argument, Dr. Caccamo found that the plaintiff was able to oppose thumb to fingers, button a button, tie a shoelace and pick a small object up off the floor. *See id.* at 533. Thus, his narrative seemingly does not lend much support to his RFC findings either.

Caccamo had. *See id*. Nonetheless, the error is harmless inasmuch as the finding that no such restriction exists is supported by substantial evidence of record.³

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³ The plaintiff also posited that the administrative law judge erred in failing to find that she suffered from diabetic neuropathy. *See* Statement of Errors at 3-4. Counsel for the commissioner argued, and I agree, that nothing turns on this inasmuch as the RFC found by the administrative law judge is supported by substantial evidence of record.

B. Error in Employing Grid Rule 202.17

As the plaintiff next observes, the administrative law judge made internally inconsistent findings. *See id.* at 4-5. She determined that the plaintiff could not carry more than ten pounds, *see* Finding 4, Record at 23 – a strength limitation that is inconsistent with the demands of light work, *see*, *e.g.*, 20 C.F.R. § 416.967(b) (light work entails "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds.") – yet she went on to find the plaintiff not disabled pursuant to Grid Rule 202.17, which presupposes an exertional capacity for light work, *see* Finding 10, Record at 23; Rule 202.17 of Table 2, Grid.

While regrettable, the error is harmless. As the administrative law judge explained in the body of her decision:

If Ms. Boyd were capable of performing a full range of light work, a finding of "not disabled" would be reached by application of [Grid] Rule 202.17. Strict application of this rule is not possible, however, as the claimant has non-exertional limitations that narrow the range of work she is capable of performing. However, the range of sedentary jobs, if not light jobs, the claimant is able to perform is not significantly diminished by her non-exertional limitations. Sedentary jobs do not generally require the ability to climb, balance, stoop, kneel, crouch, or crawl more than occasionally. A finding of "not disabled" may be reached within the framework of the above-mentioned rule.

Id. at 22.⁴ It is evident from the foregoing that the administrative law judge meant to apply the parallel Grid rule pertaining to claimants limited to the performance of sedentary work, pursuant to which the end result is the same: not disabled. *See* Rule 201.24 of Table 1, Grid.⁵

ten pounds is not capable of performing the full range of light work. See, e.g., Carter v. Barnhart, 92 Soc. Sec. Rep. Serv. 170, 175-76 (N.D.Cal. 2003) ("Light work' requires: (1) occasional lifting of 20 pounds and frequent lifting/carrying of objects weighing 10 pounds; (2) a good deal of walking or standing; and/or (3) pulling of arm or leg controls. To be considered capable of performing a 'full range' of light work, a person must be able to perform substantially all these

(continued on next page)

⁴ At oral argument, counsel for the commissioner took the position that the lifting and other restrictions found by the administrative law judge did not substantially erode the occupational base for the full range of light work, as a result of which reliance on the light-work Grid rule (Rule 202.17) was permissible. Inasmuch as appears, a plaintiff who can lift only

C. Failure To Call Vocational Expert

The plaintiff finally posits that the administrative law judge erred in eschewing the services of a vocational expert and instead relying solely on the Grid to reach her determination of non-disability. *See* Statement of Errors at 5-6. I discern no error.

Sole reliance on the Grid is permissible to the extent that a claimant can perform substantially the full range of work in a given exertional category (for example, sedentary work). *See, e.g., Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 526 (1st Cir. 1989) ("[S]o long as a nonexertional impairment is justifiably found to be substantially consistent with the performance of the full range of unskilled work, the Grid retains its relevance and the need for vocational testimony is obviated.").

Although the administrative law judge found the plaintiff unable to climb, balance, stoop, kneel, crouch or crawl more than occasionally, none of those limitations significantly erodes the unskilled sedentary occupational base. *See* Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2004) ("SSR 96-9p") at 159. Her reliance on the Grid accordingly was permissible.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

activities.") (citations omitted); *Anderson v. Massanari*, 210 F. Supp.2d 103, 110 (D.Conn. 2002) ("[A]n individual with a weight restriction of ten pounds cannot perform a full range of light work, but can perform a full range of sedentary work."). In any event, the administrative law judge herself indicated, in the above-quoted passage, that strict application of Rule 202.17 was not possible in this case.

⁵ Sedentary work, which "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools[,]" 20 C.F.R. § 416.967(a), is compatible with the RFC found by the administrative law judge.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which <u>de novo</u> review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to <u>de novo</u> review by the district court and to appeal the district court's order.

Dated this 24th day of November, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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